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PUBLIC PROSECUTOR

v.

ROSYATIMAH NEZA & ANOR.

HIGH COURT MALAYA, IPOH

PEH SWEE CHIN J

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[CRIMINAL TRIAL NO. 14 OF 1984]

14 NOVEMBER 1988

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CRIMINAL PROCEDURE: *Trafficking - 2 accused - Drugs found in room of 1st accused - Gave answer to police incriminating 2nd accused - Whether admissible - 2nd accused acquitted & discharged without defence being called - 2nd accused to rebut presumptions under s. 37(d) Dangerous Drugs Act - Power of disposal - Arrest - Meaning of.*

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Both accused were charged for trafficking in dangerous drugs. The police acting on information, raided a shop-house. On the 1st floor of the said shop-house they found the 1st accused in a room. During a search of the room, the police found cannabis in a red canvas bag under a bed in the said room. During questioning the 1st accused answered that the drugs belonged to the 2nd accused, her boyfriend.

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The issues before the Court were:

- (i) whether the answer incriminating the 2nd accused, given by the 1st accused to the police was admissible.
- (ii) whether the 1st accused being the tenant of the room, where the drugs were found, had rebutted the presumptions of trafficking raised against her.

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Held:

[1] As the 1st accused was under arrest at the time she gave the incriminating answer, and no caution having been administered to her under s. 113 CPC, the answer given to the police was inadmissible.

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[2] Since the Court found no power of disposal, the 1st accused, more probably than not, had satisfied the Court that prior to her arrest, she was not engaged in some of the activities within the definition of 'trafficking' in the Dangerous Drugs Act 1952, viz. selling, supplying or distributing any of the said cannabis found in her room. Therefore the 1st accused was convicted of the lesser offence of possession instead of trafficking under s. 39B of the Act.

[1st accused convicted for possession.]

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Cases referred to:

PP v. Salleh bin Saad [1983] 2 MLJ 164

Sambu v. Rex [1947] MLJ 16

Tan Shu En v. PP [1948] MLJ 96

PP v. Tan Seow Chuan [1985] 2 MLJ 316

Jayaraman & Ors. v. PP [1982] 2 MLJ 306

Shaaban & Ors. v. Chong Fook Kam & Anor. [1969] 2 MLJ 219

Karam Singh v. PP [1967] 2 MLJ 25

Kartar Singh v. R [1952] MLJ 85

PP v. Nordin bin Johan & Anor. [1983] CLJ (Rep) 345

PP v. Kau Joo Huat [1988] 1 SCR 293

Toh Ah Loh & Anor. v. Rex [1949] MLJ 54

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Leow Nghee Lim v. Reg [1956] MLJ 28

PP v. Ang Boon Foo [1981] 1 MLJ 40

Legislation referred to:

Criminal Procedure Code, ss. 15, 113

Dangerous Drugs Act 1952, ss. 12(2), 37A, 37(b), (d), (da)(vi), (g), 39A(2), 39B

Evidence Act, s. 30

Penal Code, s. 304

*For the appellant - DPP Tun Abdul Majid bin Tun Hamzah**For the respondent no. 1 - Shaharuddin Kassim (Bachan Singh with him)**For the respondent no. 2 - Sidney Augustin***JUDGMENT****Peh Swee Chin J:**

Both accused were charged at the outset before me under s. 39(B)(a) of the Dangerous Drugs Act 1952, (hereinafter called the Act), and the accused No. 2, viz. Nazari bin Kassim, was acquitted at the end of the prosecution case without defence, the 1st accused, viz. Rosyatimah bt. Neza whose defence I had called for earlier, was convicted on a reduced charge of s. 12(2) read with s. 39A(2) of the same Act and was sentenced to 10 years' imprisonment with effect from the date of arrest. I will set out only the material parts of the evidence below.

On 20 September 1984, PW2, viz. ASP Mohd. Azmi bin Mohd. Nadzri, (hereafter called ASP Azmi), received some information. Acting on it, he assembled a police party consisting Insp. Mohd. Zam Zam, D/Cpl Ahmad, DPC Wu, W/DPC Hasnah and raided a shop house at No. 138, Jalan Kampong Koh, Sitiawan. They went up to the first floor where he met a female Malay called Rosnorhayati who pointed out to him a room, on the same floor, the door of which was ajar. He found accused No. 1 standing inside the room. He informed her of his identity and told her that he would search her room. He, Insp. Zam Zam, W/DPC Hasnah entered the room while the remaining two members of the police party waited outside the room. ASP Azmi, during the search, recovered a red canvas bag with the name of "Anchor Draft" on it, and it was recovered from under a bed. He then unzipped the bag and found inside it a yellow plastic bag containing dry leaves believed to be cannabis, 15 small pieces of brown paper, one inner rubber tube of a tyre. He asked accused No. 1 as to who the dry leaves belonged and she answered that they belonged to her boy friend called Nazari bin Kassim, and he said pointedly he had no intention to arrest her.

I pause to mention that the admissibility of her answer i.e. that the dry leaves belonged to her boy friend Nazari (i.e. accused No. 2), had been a bone of contention between learned Counsel and learned Deputy and about this I would have more to say later.

ASP Azmi continued the search and he did not find anything else. He then instructed for the photographs to be taken and placed her under arrest and instructed W/DPC Hasnah to handcuff her.

The following day, on another information received, he went with DPC Wu to the naval base at Lumut and arrested one navy personnel called Nazari bin Kassim (accused No. 2) who was searched and nothing was found. He then proceeded to accused No. 2's ship, "Seri Indera Bakti" and on board the ship he searched accused No. 2's locker to which the accused No. 2 had a key. From the locker he recovered accused No. 2's restricted passport and a bunch of 3 keys.

In cross-examination, he stated that the information before the police raid was received at about 12.30 p.m. relating to the room and the person involved or believed to be involved. He said that on his police party approaching the said room, armed with the information that

- a* he had, he would apprehend any person escaping from the room. The two policemen stationed outside the room were not on guard, but were merely standing outside. After discovering the dry leaves, he would not have allowed accused No. 1 to go anywhere. He said further that after discovering the dry leaves, before asking accused No. 1 the question as to whom they belonged, if accused No. 1 had run away from the room, he would not instruct his men to arrest her. (In the same breath), he said that he would not allow her to escape. He did not agree that a person could be placed under arrest without being handcuffed and that if someone submitted to custody he would still handcuff him.
- b*

- c* He agreed that accused No. 1 looked surprised. He told her that he had reason to believe that cannabis was in the room. He said that the view of the bag under the bed was not obstructed by anything. He said there were 3 other rooms besides accused No. 1's and he didn't search them. From in front of the threshold of accused No. 1's room, the bathroom and the kitchen on the same floor were not visible. At no time had the accused No. 1 admitted that the said red bag and its contents belonged to her.

- d* He said that accused No. 1 was a bar waitress at the time of the said raid but he did not know if the other occupants of other room were bar waitresses. The first thing he asked Rosnorhayati who was in the hall on his arrival was where the room of Rosyatimah (accused No. 1) was. He did not see accused No. 2 there neither did he find any belongings of the accused No. 2. He did not know that Sofie (whom other waitresses referred to as Saffie) was one of the persons who had frequented the house. He had come across the name of Sofie in the investigation paper.

- e* A member of the police party, viz. Insp. Zam Zam gave evidence also confirming the evidence of ASP Azmi on all material points. He also said that if accused No. 1 had wanted to leave the room, she would not have been allowed to do so and he would have restrained her. If she resisted his attempt to restrain her, he would have her handcuffed. He also requested Insp. Mat Alias bin Abdullah to record a cautioned statement from her. He also requested one Insp. Zainuddin to record another cautioned statement from accused No. 2. He also went back to the house of the accused No. 1 on 26 September 1984. In the room when the accused
- f* No. 1 was first seen by the police party, he recovered some clothes, consisting of a shirt with a number of 809282 printed on it. He took possession of it and 5 other shirts and 4 pairs of trousers. He also recovered in the same room one black metal crash helmet (one usually worn by a rider of motor cycle) and one pair of scissors. He said he did not try out the bunch of keys recovered by ASP Azmi from accused No. 2 on any lock. ASP Azmi had also said he did not also try out any of the 3 keys from the bunch on any lock. Insp. Zam Zam further said that accused No. 1 had not tried to run away and that he did not know if
- g* accused No. 1 was taken for an urine test and that the test was negative. Of the 6 shirts, only 3 shirts bore the number of 809282 respectively. Of the 4 pairs of trousers, one pair had the number of 809282, two pair had no number at all while the last pair had the number of 1187. Of the 4 pairs of the trousers, 2 pairs were of the same size and the other two pairs were of different sizes. The 3 other occupiers of 3 respective rooms were all bar waitresses, like accused No. 1. They were Rokiah, Zaiton and Rosnorhayati.
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- i* Insp. Zam Zam agreed that in the report lodged by ASP Azmi in this case, no mention was made about the question asked of the accused No. 1 to whom the dry leaves belonged. Rokiah had told him that one Sofie had frequented the place; and that he was a former navy personnel who had been sacked. He had found or ascertained that accused No. 2 was on board the navy ship "Sri Indera Sakti" on the day of accused No. 1's arrest.

Yet another member of the police party gave evidence; he was D/Cpl. Ahmad bin Daud who confirmed the evidence of ASP Azmi on all material points. One of the 4 girls, he recognized as Hayati had been arrested for being involved in one cannabis case, in connection with which he had arrested her at some other house. At first, he said, he was asked to guard outside the room (in which the cannabis was recovered).

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One of the accused No. 1's house-mates, viz. Zaiton gave evidence, *inter alia*, she identified the room occupied by accused No. 1. She said sometimes male or female friends occupied accused No. 1's room which accused No. 2 also sometimes frequented. Many friends, both men and women, visited accused No. 1 and not just accused No. 2. She said she last saw accused No. 2 two months before the date of her arrest. She had seen accused No. 1 bring the red canvas bag (i.e. P3). She agreed there was a room over the floor where he and other girls stayed; (it appeared to be in some sort of attic). One Cpl. Hussain, a bachelor, (also of the navy) sometimes slept there. Accused No. 1 and Rokiah worked in the same pub. In connection with the said red canvas bag which contained the crash helmet, she said the accused no. 1 had no motor cycle. She said she had seen accused No. 1 having a bag similar to the said canvas bag, i.e. (P3). Quite a number of visitors to the house possessed motor cycles which were all parked downstairs.

*b**c*

Yet another house-mate of accused No. 1 gave evidence; viz. Rosnorhayati who gave somewhat similar evidence, and for the sake of brevity, I will only refer to such parts of the evidence as may be necessary.

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Rokiah, not only a house-mate, but also a colleague of the accused No. 1, gave evidence which was marked by her candour unlike the evidence of the other girls affected by some degree of evasiveness. Each of the 4 girls on the same floor, including herself, she said, had a man staying with her, and accused No. 2 was staying with accused No. 1. Two nights before the date of arrest, she saw at the pub where she worked with accused No. 1, accused No. 2 outside the pub. He had come asking accused No. 1 for the key to the latter's room for the stated purpose of sending his soiled clothes there. At that time accused No. 1 was drunk.

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Rokiah further said she knew 2 ex-navy personnel called Saffie and Rahmat respectively. The said Saffie had free access to her room, and had also a motor car with the registration number of PAU 5511. After the arrest of accused No. 1, the said Saffie had disappeared. She further stated that 1st accused was a habitual drinker, and one day before the arrest, the 1st accused was completely drunk and she had to be taken home by Saffie and Rahmat in the said motor car. Accused No. 1 had to be carried to her own room. She thought somebody had mixed accused No. 1's drink with something (obnoxious). She said further Cpl. Hussain was a former boyfriend of accused No. 1 and he had free access to the 1st floor.

*f**g*

She said further that on the evening before the date of arrest, Saffie came to the house. Apart from accused No. 2, accused No. 1 had other men friends who did come to their house and had baths and changed their clothes in accused No. 1's room before going out. These men were civilians or navy personnel and some of them spent the night in accused No. 1's room.

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She said accused No. 1 was very popular where she worked. Accused No. 2 had no key to accused No. 1's room otherwise he wouldn't have called at the pub for it.

The chemist who gave evidence confirmed after analysis that it was cannabis that was found in the red canvas bag. Navy lieutenant Selveswaran said there was a rating called Saffie.

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- a** A highly controversial point incriminating accused No. 2, both during and at the end of prosecution case was whether the answer given by accused No. 1, (Rosyatimah), to ASP Azmi to the effect that the cannabis in the red canvas bag had belonged to the accused No. 2 was or was not admissible.
- I held that it was not admissible after hearing arguments of all Counsel for the following reasons.
- b** Section 37A of Dangerous Drugs Act (in *pari materia* with s. 113 of the Criminal Procedure Code) says as follows:
- 37A. Admission of statement in evidence
- c** (1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or, is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not interpreted to him by any other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if
- d** such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
- Provided that no such statement shall be admissible or used as aforesaid:
- (a) ...
- e** (b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words the like effect:
- It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.
- f** Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.
- (2) ...
- (3) ...
- g** It could not be disputed in the instant case that no caution was ever administered before the answer was given to ASP Azmi by accused No. 1.
- I was quite satisfied that there was time to administer such a caution if ASP Azmi had the intention to administer it from the evidence set out above.
- Section 37A of the Act (and for that matter, s. 113 of the Criminal Procedure Code) would make accused No. 1's answer to ASP Azmi inadmissible if, *inter alia*, it was made after her
- h** arrest, and no caution was administered to her before it was made. The issue was therefore whether she was under arrest at the time giving this answer. If she was, the answer would be in admissible, and if not, admissible.
- On the meaning of the word, "arrest" there appeared to be 2 diverging lines from the reported cases. When referring to such cases, they would also use the words "in custody" in this
- i** connection. Being in custody would, in my view, without any doubt, include or imply or presuppose a prior arrest.

On the one hand it has been held that before person is arrested, there must be an actual arrest, please see *PP v. Salleh bin Saad*, [1983] 2 MLJ 164.

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On the other hand, it has been held and it is also my view that a person is under arrest already if he is in a state of being watched or guarded to prevent his escape, please see *Sambu v. Rex* [1947] MLJ 16 and *Tan Shu En v. PP* [1948] MLJ 96; or from the circumstances, it can be implied that his personal liberty has been restrained, please see *PP v. Tan Seow Chuan*, [1985] 2 MLJ 316.

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It was submitted however, that the decision of the Federal Court in *Jayaraman & Ors. v. PP*, [1982] 2 MLJ 306 was an authority for the proposition that there should be an actual arrest. It would be necessary to analyze somewhat that decision. In the *Jayaraman* case, the Federal Court was considering s. 113 of the Criminal Procedure Code (which is in *pari materia* with s. 37A of the Act), but the decision would be equally relevant on s. 37A of the Act.

c

The learned Lord President Tun Suffian, first considered s. 15 of the Criminal Procedure Code which is set out as follows:

15. Arrest, how made.

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be submission to the custody by word or action.

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(2) If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest such officer or other person may use all means necessary to effect the arrest.

His Lordship next quoted the passage of Lord Devlin from the Privy Council case of *Shaaban & Ors. v. Chong Fook Kam & Anor.* [1969] 2 MLJ 219 as follows:

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An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going when he may want to go. It does not occur when he stops an individual to make enquiries.

The important words in the passage of Lord Devlin's advice above appeared to be: "It (arrest) does not occur when he stops an individual to make enquiries". His Lordship Tun Suffian further said: "That the question would depend on the facts of each case".

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The facts in that cited case were as follows.

Idols in a Hindu temple had been destroyed by some persons and the police were alerted. Two Indians in this case lodged a report to the police of another attack. (They were subsequently charged under s. 304 of Penal Code for killing some attackers of the idols). The police corporal went to the temple to investigate, in pursuance of such report, such attack and the two Indians might be material witnesses. The corporal told the two Indians and others, (all such persons were not accused persons at that time but appeared to be complainants about the attack on the idols), to wait and not to leave the temple.

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His Lordship came to the conclusion that the corporal had merely stopped these complainants about the attacks on the idols, in order to make enquiries into such attack and the answers given by these two Indians and others were admissible as they had not been arrested at the time of such answers despite the absence of a caution administered to them. His Lordship further concluded to the effect that these 2 Indians were not under arrest at the time of giving answers, for apart from the fact the corporal was making enquiries of them as they

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a might be material witnesses and in any event he did not tell them he was arresting them, neither did he use force to restrain them or make it clear by words or conduct, he would if necessary use force to prevent them from going where they might have wanted to go.

The judgment of his Lordship would not appear in my opinion, to support the view that there need be any actual arrest, at all, and that the question of whether a person is under or not under arrest would depend therefore on the facts of each case.

b Looking at the evidence of ASP Azmi in the connection, I had no doubt that he would use force, if necessary, to prevent accused No. 1 (Rosyatimah) from leaving her room or the house, this could be inferred from his evidence and surrounding circumstances. He had just recovered the cannabis from the red canvas bag recovered from under the bed in accused No. 1's room. He said, *inter alia*, that armed with the information received before the raid on accused No. 1's room, he would apprehend any person escaping from the same room. Two policemen were instructed to stand outside the same room. He said after discovery of the cannabis, if the accused No.1 had run away from the same room, he would instruct his men to arrest her. He maintained however to the effect that a man could not be arrested without being handcuffed, and in my view, such handcuffing would be an exercise *ex abundanti cautela*, it being, after all, one of the usual steps to prevent her escape. I therefore held that the answer of accused No. 1 that the cannabis had belonged to accused No. 2 was inadmissible.

c Without such evidence, the evidence against the accused No. 2 would be that he had frequented the room of accused No. 1 more frequently than other men who had access to accused No. 1's room. The other evidence was that the accused No. 2 had some clothes in the room of accused No. 1's room, such clothes having been mixed up with some other clothes of other person or persons. The inner tube of a motor cycle's tyre found in the red canvas bag could equally belong to accused No. 2 and other men. The accused No. 2 had once asked for the room key from accused No. 1 at the pub where she worked in order to send to the room his soiled clothes and no one in the case had even suggested that he was sending to her room cannabis. If prosecution wished to rely on circumstantial evidence, which was the only evidence against the accused No. 2, such evidence must be inconsistent with any other hypothesis than that of guilt of the accused No. 2, see *Karam Singh v. PP*, [1976] 2 MLJ 25, or such evidence must be such, that, if believed, there would be no reasonable alternative to the guilt of the accused, please see *Kartar Singh v. R*, [1952] MLJ 85.

d Such was the very poor quality of the evidence against the 2nd accused and on such evidence standing alone, I felt it would be wholly unsafe to convict the accused No. 2 and therefore no *prima facie* case had been established against him. The position would have been the same even if such circumstantial evidence was combined with the incriminating answer of accused No. 1 given to ASP Azmi referred to above, assuming such answer to be admissible instead. Accused No. 1 was a co-accused of accused No. 2 and though such answer, by virtue of s. 30 of the Evidence Act could be considered by the Court against accused No. 2, such answer would have to be shored up with other evidence that was cogent and which had real probative value to the charge, per the then Raja Azlan Shah LP in *PP v. Nordin bin Johan & Anor.*, [1983] CLJ (Rep) 345. I asked myself if the circumstantial evidence against accused No. 2, referred to earlier and apart from accused No. 1's answer to ASP Azmi, was such cogent evidence with such real probative value to the charge. The result was that I had grave doubts that such circumstantial evidence referred to earlier was of this variety of evidence at all. Such being the case, I concluded that no *prima facie* case had been established against the accused No. 2 whom I acquitted and discharged without calling for his defence.

In regard to a question whether defence should be called in respect of accused No. 1, the learned Deputy had relied on the statutory presumptions under s. 37(b), (g) and (d), and (da)(vi) (presumption of trafficking) set out as follows:

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- (b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;
- (g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;
- (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

In my view, being the tenant of the room from which the cannabis was recovered, and to which room, she alone had the key, I was satisfied that the statutory presumption of her being the occupier because of her having control or management of the said room had arisen against the accused No. 1 under s. 37(b).

I was satisfied further that since the cannabis was found in a zipped-up red canvas bag which was found hidden under the bed of the accused No. 1's room, the statutory presumption of concealing the cannabis with the knowledge of the accused no. 1 had arisen also against accused No. 1 under s. 37(g).

I was further satisfied that since the accused No. 1's room was in exclusive possession of the accused No. 1 because she alone had the key and was the sole tenant, (notwithstanding the fact that when she was in the house, her room was unlocked and accessible to many a man), she therefore had in her custody the red canvas bag containing the cannabis. Therefore the statutory presumption under s. 37(d) arose such that she was deemed to be in possession of the cannabis to know the nature of the content or substance of the red canvas bag i.e. the cannabis.

Since the cannabis weight more than 200 grammes, the statutory presumption of trafficking also arose against her.

Having regard to the statutory presumptions invoked by the prosecution in aid of itself, the Court found a *prima facie* case established against the accused No. 1 whose defence was then called.

The accused No. 1, aged 24, waitress at a pub, gave evidence, *inter alia*, to the effect that in the course of her job, she had to entertain customers and take all sorts of drinks. She had many men friends among whom were the accused No. 2 and one Hussain. When at home, her room would be unlocked, and it remained unlocked when she went to the toilet or bathroom some distance away. She knew one Saffie described by her as the boy friend of Rokiah (PW9) who had come to her room to listen to music from her transistor radio. He did so on 19 September 1984.

On 18 September 1984, 2 days prior to her arrest, she had started work at 8 p.m. and accused No. 2 had come to the pub to see her to ask for her room key to send his soiled clothes there. He later returned the key shortly after 10 p.m. Accused No. 1 usually washed the clothes of accused No. 2. She said that the room occupied by the said Hussain was on the top floor (above her floor). She had no "L" driving license for motor cycle and accused No. 2 had a motor cycle.

- a** On 19 September 1984, accused No. 2 came at about 5.30 p.m., holding in one hand a plastic bag which was like the plastic bag with 2 layers, i.e. (P4 and P5), containing the cannabis, recovered by the police. He was holding with the other hand some brown paper which was similar to P6 (being 15 pieces of brown paper). She asked accused No. 2 what was it and he said “ganja”, but he didn’t show the contents of the plastic bag he was holding to her. Accused No. 2 told her he was handing the cannabis to Saffie who was then in Rokiah’s room. She followed him to Rokiah’s room and saw accused No. 2 handing over what he was holding to Saffie in that room.
- b**

- c** That night at the pub, she said that she took a number of different drinks, and she told Rokiah she was drunk and wanted to go home. When arriving at the house, she had to be helped going upstairs and she then fell asleep. On the next day, at about 1.15 p.m. when she was dressing up, combing her hair and applying make-up, the police party raided her room. When told that they wanted to search the room for “ganja” she was shocked and surprised. She told them to go ahead. She was asked to take out whatever that was under the bed. She then took out the red canvas bag, which she said she used to bring along on her return to Kampong in Johore Bahru once a year. She took out from the red canvas bag 3 empty plastic bags from “Avon”. She did not know how the rubber inner tube of a motor cycle (which was found inside the red canvas bag) came to be inside it. She realised it was cannabis when the police showed it to her. On 19 September 1984 the accused No. 2 did tell her that it was cannabis that he was carrying. She was totally unaware of the cannabis in her room.
- d**

- e** She said accused No. 2 and she were together for about 1 year prior to her arrest. She drank a lot of liquor on the eve of her arrest. Rokiah was with her when she was taken back from the pub to her room drunk. She had broken off from Hussain 1 year prior to her arrest. She allowed her friends to change clothes in her room.

- f** She did follow accused No. 2 to Rokiah’s room on the day before the arrest. She said Saffie was Rokiah’s boyfriend. Accused No. 2 did not tell her why accused No. 2 said to her that it was important that she should give the key to her room at the pub. She was referred to a statement made to the police earlier in which she had said accused No. 2 had shown the cannabis to her the day before her arrest. She admitted making the statement. She did not know whose helmet it was. She said the drug found in the bag was a frame-up against her.

- g** Apart from accused No. 2, the names of her other boy friends were Hussain, Sulaiman, Ramli, Azman, Abdul Aziz, Yeop, Man and others whose names she could not remember. She said accused No. 2 normally used a crash helmet. She said Hussain was not happy with her when they broke off. On the day before her arrest, Saffie had the opportunity to plant the cannabis in her room. He had tried to make advances to her but they were rejected. He was jealous because she was close to accused No. 2. About the words in the statement about accused No. 2 showing cannabis to her, viz. “...serta menunjukkan ganja yang telah dimasukkan dalam plastik ...”; she explained that by these words, she did not mean that accused No. 2 had actually showed her the cannabis. Despite an application to impeach her credit, I found it had not been impeached, but the Court warned itself to treat her evidence with caution.

- h** Rokiah was recalled to the box and she confirmed that her boy friend called Saffie had been handed a yellow plastic bag by accused No. 2 and the yellow plastic bag (of 2 layers) which had contained the cannabis involved in this case was described as being similar in colour to the one she saw. She said Saffie took out the contents which she described as sticky or wet and “greenish” but the cannabis recovered by the police now shown to her was yellowish and dry. The said Saffie asked her for permission to keep the plastic bag in her room and she did not allow it. Then accused No. 1 was in the bathroom and accused No. 2 had joined
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her there. Saffie told her he had brought the cannabis from Thailand. Saffie brought the plastic bag of cannabis to accused No. 1's room when accused No. 1 was in the bathroom. Accused No. 1 was not a drug addict but her boy friend called Hussain was.

a

After hearing submissions of both Counsel, accused No. 1 was convicted on a lesser charge under s. 12(2) read with s. 39A(2) of the Dangerous Drugs Act and sentenced as stated before.

b

I feel I ought to give an explanation as to the propriety of convicting the accused No. 1 for a lesser offence under s. 12(2) without the formality of amending the earlier charge under s. 39B of the Act, and calling upon the accused No. 1 to plead thereto.

Section 169 of the Criminal Procedure Code (CPC) sets out as follows:

169. When Offence Proved Is Included In Offence Charged.

c

(1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it.

d

Section 167 of the Criminal Procedure Code also provides as follows:

167. When A Person Charged With One Offence Can Be Convicted Of Another.

If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

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Although ss. 167 and 169 do not provide that the charge need not be amended and that the plea of an accused need not be taken thereto, in my view, this would depend on the circumstances in each case, bearing in mind always the predominant question as to whether an accused person may be prejudiced thereby.

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In the instant case, the defence evidence and submissions had by then concluded, and considering the nature of s. 12(2) of the Act, there would be utterly no need for the accused No. 1 to adduce further evidence or for her Counsel to make any further submission on her behalf, thereby causing no possible prejudice to the accused No. 1. The formality of formulating a charge would be useless at that stage for these reasons, and at best it would be an excess of caution.

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Accused persons in murder cases have been for a long time often convicted for an offence of homicide not amounting to murder, obviously under these sections. These cases provide a classic example of the sort of discretion which I exercised.

I must hasten to add that the exercise of such a discretion ought to be carried out according to the certain well-established principles. I respectfully adopt the *dictum* expressed by Taylor J in connection with the propriety of convicting a person on a lesser and unframed charge, in the Singapore case of *Lew Hin v. Reg.* [1956] MLJ 131, 134, in the following words:

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There are two main tests. First, the facts must be such that the unframed charge was available from the start, and could have been framed and tried concurrently under s. 165; secondly the evidence must have been presented in such a way as to raise all the same issues of facts as

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- a* would have been raised, had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the evidence for the defence would have been the same.
- The s. 165 referred to in the above passage was found in Singapore's Criminal Procedure Code then.
- b* In the instant case, the proof of a charge of trafficking under s. 39B of the Act could be said to have 2 stages; the first being proof of possession of the drug in question, and the 2nd, trafficking, in respect of which the prosecution could and did conveniently rely on the weight of 200 grammes or more as the weight of the cannabis in this case as raising a statutory presumption of trafficking. On the other hand, the proof required under s. 11(2) would merely be the possession of the drug in question. At the end of the defence I found
- c* that the presumption of trafficking had been rebutted, but the presumptions relating to possession had not been so rebutted, hence the conviction for possession under s. 11(2) of the Act.
- Alas, an error would appear to have crept into this case. One or two weeks after the verdict of the instant case, learned defence Counsel for accused No. 1 saw me in chambers and drew my attention to the fact that his client should have been sentenced under s. 11(3) of the Act, which carried a maximum of 5 years' imprisonment, and not sentenced under s. 11(2) and read with s. 39A(2) of the same Act; the said s. 39A(2) carrying a range of sentences between 5 years' imprisonment and imprisonment for life, and whipping of not less than 10 stokes (from which women so convicted are of course exempted by virtue of s. 289 of the CPC). He intimated further that s. 39A(2) was an amendment which should not apply retrospectively to his client having regard to the date of her offence.
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- e* Unfortunately, none of the 3 Counsel, including the learned Deputy had drawn my attention to this at the trial and I had relied on a booklet containing the Dangerous Drugs Act 1952 incorporating all amendments as at 10 August 1986 (not published by the Malaysian Current Law Journal Sdn. Bhd.) and it gave no indication whatever as to any amendment having been effected and the relevant date for such amendment. The library clerk had, beside the
- f* s. 39A(2), written the words "Act 659" which also appeared by the side of s. 37 relating to various statutory presumptions in the same booklet.
- Section 39A(2) appears to have been amended and gazetted on 31 December 1986 and to have come into force on 1 January 1987. The Supreme Court is invited to consider, with my great respect, and provide of course, that the Supreme Court agrees with the conviction of accused no. 1 for a lesser offence under s. 11(2) of the Act reducing the 10 years' imprisonment to the maximum of 5 years' imprisonment or less.
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- In this connection with the neat booklet incorporating all the amendments, one hankers for those old booklets published by Government Printers with all the slips recording such amendments pasted up on them, a bit in tatters perhaps, but certainly more oversightproof.
- h* I will now explain my findings at the end of the defence case and after hearing submissions from both sides. I bore in mind that the accused No. 1 would be required to rebut, in particular, the following statutory presumptions on a balance of probabilities that (i) she was aware of the nature of the cannabis recovered from her room; (ii) that she was aware that the cannabis was concealed in her room, and (iii) that she was a trafficker (by virtue of the weight of the cannabis recovered).
- i*

I found as follows:

- (a) On the day of her arrest, and on the day previous to the day of arrest, she alone had the key to her room. a
- (b) She and accused No. 2 were lovers and she was so intimate to him that she even washed his soiled clothings. She, more probably than not, was prone to tolerate wrong-doing of accused No. 2. b
- (c) The accused No. 2 had shown her a plastic bag the day before her arrest, and told her that it contained cannabis.
- (d) She was very drunk the night before the day of her arrest and had to be carried home in a drunken stupor.
- (e) She was a drunkard and spent a large part of waking hours getting drunk. She, therefore, more probably than not, had a rather hazy perception of her surroundings. c
- (f) She knew she was associating with potential traffickers like accused No. 2 and Saffie who were dealing in cannabis.
- (g) The accused No. 2 did bring the cannabis on to the premises, on the day before the day of her arrest, and the Court accepted the evidence of Rokiah. d
- (h) The cannabis was placed and hidden by either accused no. 2 or Saffie and this took place while accused no. 1 was in the bathroom.
- (i) The accused No. 1, more probably that not, had been put on enquiry as regards the distinct possibility of the cannabis being put in her room, but she took no positive steps to ascertain it because, first, she was busy washing clothes in the detached bathroom some distance away; secondly she could be that night preparing to go to work at the pub later, thirdly that she was dead drunk that night and had to be carried home, fourthly probably she loved accused No. 2 too much to tackle him as to whether he had hidden actually any cannabis in her room. She did not herself place or hide the cannabis under the bed. e
- (j) She was not an addict. She had no power of disposal over the cannabis found. f
- (k) She had not trafficked in any way in the cannabis found.
- (l) She had not satisfied the Court on a balance of probabilities that she was unaware that the cannabis recovered was hidden in her room before its recovery.
- (m) She had however satisfied the Court on a balance of probabilities that she did not know the actual part of the room where such cannabis recovered was hidden by accused No. 2. g

I therefore found her guilty of possession for having failed to rebut the statutory presumptions as to possession except that the presumption of trafficking had on the other hand, been successfully rebutted by her as the Court was satisfied it was more probable than not, that she had not trafficked in the cannabis having regard to, and despite a myriad of meanings given by the Act to the word - "trafficking". h

I think I ought to say a few words about the recent Supreme Court case of *PP v. Kau Joo Huat*, [1988] 1 SCR 293 in connection with my finding of accused No. 1 having no power of disposal over the cannabis recovered. i

a That case is authority for saying that on a charge of possession under the Act, it is no longer necessary for the prosecuting to prove the ingredient of power of disposal of an accused person over the drug found. This case has no doubt made the decisions hitherto on this particular point obsolete, such as the cases of *Toh Ah Loh & Anor. v. Rex* [1949] MLJ 54; *Leow Nghee Lim v. Reg.* [1956] MLJ 28; *Chan Pean Leon v. PP* [1956] MLJ 237; and *PP v. Ang Boon Foo* [1981] 1 MLJ 40.

b I naturally followed the decision in this case by finding the accused No. 1 guilty of possession of the cannabis recovered by the police despite my finding also at the same time that she had no power of disposal over the drug. I would have had no hesitation in acquitting her altogether but for *Kau Joo Huat* case.

c However, the finding of the absence of power of disposal, though it did not render the possession non-incriminating was in my view, one of relevant factors, though by no means conclusive standing by itself, for the Court to consider if she had, on a balance of probabilities, rebutted the presumption of trafficking. Such presumption could be rebutted usually by surrounding circumstances. Since the Court found no such power of disposal, the accused No. 1 more probably than not, had satisfied the Court that prior to her arrest, she was not engaged in some of the activities within the definition of the word “trafficking” in the Act,

d viz. selling, supplying or distributing any of the said cannabis found in her room. I must add that the said absence of power of disposal was merely one of findings, as it has been seen.

I therefore convicted her for the lesser offence of possession instead of trafficking under s. 39B of the Act.

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Also found at [1989] 1 CLJ 481

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